United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1476

To be argued by
ELIA WEINBACH

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1476

UNITED STATES OF AMERICA,
Appellee,

—against—

BRADLEY BRANICK and BARBARA TIRA,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
ELIA WEINBACH,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Bradley Branick and Barbara Tira appeal from judgments of the United States District Court for the Eastern District of New York (Neaher, *J.*) entered October 8, 1976. Appellants were charged in a five count indictment with conspiracy; importation, and possession with intent to distribute hashish oil brought from Pakistan into the United States on April 4 and April 8, 1976.[1] (T. 21, U.S.C. §§ 841(a)(1); 846; 952(a); 960(a)(1)

[1] Count One charged conspiracy to import hashish oil between April 4 and April 8, 1976; Count Two charged importation of hashish oil on April 4, 1976; Count Three charged possession of hashish oil with intent to distribute on April 4, 1976; Count Four charged importation of hashish oil on April 8, 1976, while Count Five alleged possession with intent to distribute hashish oil on

[Footnote continued on following page]

and (a)(2); 963; and T. 18, U.S.C. § 2). Branick and Tira were tried before a jury. Branick was found guilty on all five counts; Tira was convicted on Counts One, Four and Five and acquitted on Counts Two and Three.

Branick was sentenced on each count to two years imprisonment and a special parole term of five years, the sentences to run concurrently. Execution of sentence was stayed pending appeal. Tira was sentenced on Counts One, Four and Five to a one year term of imprisonment, two years special parole term, and five years probation, the sentences to run concurrently. Execution of Tira's prison term was suspended, and the probationary term was ordered to begin immediately.[2]

Appellant Branick raises no issues on appeal and has stated in his brief that there are no non-frivolous issues which can be asserted. Appellant Branick's Brief, at 9. Appellant Tira assigns as error two rulings of the District Court. The first ruling permitted the Government to introduce evidence of prior hashish oil smuggling activities of both appellants and Jeffrey Pierce in 1972 and 1973. The second ruling prevented Tira from gaining access to the Pre-Trial Services file on Pierce and quashed the subpoena directed to the Pre-Trial Services officer who had reported on Pierce's compliance with the pre-trial release conditions imposed upon him after his arrest.

April 8, 1976. The indictment also charged Jeffrey Pierce, in Counts One, Two and Three. Pierce pleaded guilty on May 7, 1976, to Count One of the indictment and testified for the Government in the trial of Branick and Tira.

[2] Jeffrey Pierce, the third defendant, was sentenced on July 23, 1976, to five years probation under the Federal Youth Correction Act, T. 18 U.S.C. § 5005 *et seq.* At the time of his sentence, the charges on Counts Two and Three were dismissed pursuant to an agreement reached between the Government and Pierce. (161, 162).

Page numbers in parenthesis refer to the trial transcript.

Statement of Facts

A. The Government's Case

1. Introduction

The Government's case was presented principally through the testimony of Jeffrey Pierce, appellants' co-conspirator. The evidence showed that Pierce was arrested at Kennedy Airport on April 4, 1976, after a Customs inspection of his suitcase revealed a false bottom concealing four kilograms of hashish oil. (37, 90, 398). After his arrest, Pierce spoke to Drug Enforcement Administration ("DEA") agents and admitted that he and two other individuals, appellants Branick and Tira, had arranged in Arizona to travel to Pakistan to purchase hashish oil and smuggle it into the United States. (150, 152, 221, 227). Based upon Pierce's information, Tira and Branick were arrested four days later, on April 8, 1976, as they passed through Customs at Kennedy Airport. (404, 413). As Pierce had said they would, the agents discovered four kilograms of hashish oil concealed in a false bottom of Tira's suitcase. (69, 95). Branick's suitcase was searched and it contained no contraband, also as Pierce had previously indicated. (40, 151).

2. The Background of the Conspiracy

Pierce testified that prior to April, 1976, he had been involved in hashish smuggling with Branick on two prior occasions and with Tira once. Pierce stated that he met Branick in Tucson, Arizona, in November 1972, and Branick offered to pay Pierce and Mark Schueneman [3]

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[3] Mark Schueneman, at the time Pierce's roommate, testified and corroborated Pierce's version of Branick's offer. (363).

$10,000 to go to Afghanistan to smuggle hashish oil into the United States. (166). Pierce accepted the offer, flew to Afghanistan in December 1972, stayed in Branick's rented house in Kabul, and after spending several weeks there, returned to the United States carrying a suitcase loaded with hashish oil. (179, 186, 187). The hashish oil was placed in the suitcase by Branick in his Kabul house. (180). Pierce testified that Branick had made all the arrangements for Pierce's trip and had paid for it. (170). After returning to the United States, Pierce met with Branick in Tucson, turned over the suitcase filled with hashish oil and was paid $7,500. (189, 190).

Approximately six months later, in July 1973, Pierce flew from Arizona to Pakistan with Branick and Tira. Pierce met Tira for the first time at the Pan American office in New York where Branick purchased for cash three round-trip tickets to Pakistan. (199). The three then went to the Pakistani consulate where visas were obtained;* they then travelled together to Pakistan. (200). Pierce and Tira stayed together for ten days in a hotel in Peshawar. (202). Branick, who stayed elsewhere, eventually summoned Pierce and Tira to a hotel room where they were shown three suitcases. Branick explained to both Tira and Pierce that the "oil " was in the lining. (204). Tira and Pierce, each carrying one suitcase, then went to Karachi where they later met with Branick. (208). Thereafter, the three flew back to Tucson where Tira and Pierce turned over the suitcases to Branick. (210). Tira had previously told Pierce that she was getting $6,000, the same sum which Branick had promised Pierce. (198, 209). Pierce chose, however, to be paid his share in hashish oil, which Branick gave him in Tira's presence. (211).

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* A Pakistani consulate official testified that Barbara Tira and Jeff Pierce received consecutively numbered visas on July 3, 1973. (251, 253).

After the July 1973 trip Pierce returned to California and did not see Branick again until late 1975 when he returned to Tucson. At that time, Pierce took up residence in Branick's home and worked in Branick's handicraft store, which eventually closed in late 1975. (218, 219). The stage was thus set for the smuggling scheme for which Pierce, Branick and Tira were arrested.

3. The Smuggling Conspiracy—April 1976

The conspiracy to smuggle the hashish oil began in February, 1976. Pierce stated that he met with Branick in Tucson and was promised $6,000 if he would help smuggle hashish oil into the United States. (221). Pierce agreed and was told by Branick to proceed to a remote tribal area in Pakistan. Pierce flew to Pakistan at Branick's expense and waited for 16 days before he was joined by Branick and Tira. (222, 226, 227).

Upon his arrival, Branick took Pierce's and Tira's suitcases. Later, Branick returned the luggage and instructed Pierce to return to the United States (229). Pierce saw Tira's and Branick's suitcase before he left for New York, and Branick told Pierce that when he (Branick) arrived in New York with Tira he would be "clean." (230, 231).

Pierce then flew alone from Pakistan to New York. Upon arrival at Kennedy Airport on April 4, 1976, on a Pan American flight (146, 147), he presented his suitcase to Customs inspectors who examined it and discovered a false bottom concealing a dark, oily substance later analyzed by a DEA chemist as hashish oil (37, 89). Pierce's suitcase contained over two kilograms of hashish oil (8.8 pounds). (90).

Pierce was promptly arrested by Customs inspectors and DEA agents (37, 398). At first, he stated that he

acted alone in smuggling the hashish oil. (149). He later admitted, however, that he had conspired with Branick and Tira to smuggle hashish oil from Pakistan for eventual delivery to Tucson, Arizona, where Branick and Tira lived. (149, 188). Pierce told the agents that Branick and Tira were still in Pakistan and would arrive in New York on April 8, 1976. (151). He said that Tira's suitcase would contain hashish oil concealed in a false bottom. Branick, Pierce said, would be carrying a suitcase which would be "clean", or free of hashish oil. (151).

Acting on Pierce's information, DEA agent John Trustey and two Customs inspectors went to the Pan American terminal at Kennedy Airport on April 8, 1976 to await the arrival of Branick and Tira. (74, 76). Pan American Branick and Tira arrived on the same flight from Pakistan and proceeded through the Customs area. (40, 63). Tira presented for inspection a suitcase bearing her name tag. (328). She stated that she had been in England and France and opened her suitcase (67, 77). A Customs inspector discovered a thick brown substance concealed under a false bottom. (69). The substance was later analyzed by a DEA chemist as hashish oil, weighing over four kilograms. (69, 95). Tira was then placed under arrest.[5]

When Branick passed through Customs, his suitcase was examined and no hashish oil was found. (40). He was subsequently arrested by DEA agents acting on an arrest warrant issued two days earlier on the basis of information obtained from Pierce.

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[5] Based upon a street value of $20 to $40 a gram (466), the value of the hashish oil seized from Pierce and Tira in April 1976, which weighed in excess of eight kilograms (90, 95), ranged from $160,000 to $320,000.

4. The Post-Arrest Statements of Barbara Tira

Following her arrest, Tira was questioned by Agent Trustey and gave what can only be characterized as an incredible story. She denied knowing that anything was in a bottom of her suitcase. (405). She claimed that the bag was not hers. (406). After being shown her name tag, attached to the bag, she still stated that the bag was not hers but said she was bringing it to the United States for a Pakistani named "Abdu" whom she had met in Karachi. (406). "Abdu" was not on the flight with Tira and she did not know how to contact him, and, as far as she knew, Abdu did not have her address or phone number. (406). When questioned as to how she would know to whom she was to deliver the suitcase, Tira produced half a note and she stated that whoever would claim the bag would possess the other half of the note. (406, 407). Tira stated that a friend had purchased her air ticket to Pakistan, but she could not remember her friend's name. (407). She denied returning with anyone from Pakistan. (408).

Tira was informed that Branick had been arrested and she admitted that she knew him and that he had purchased her airline ticket. (413). She also admitted that she had been in Pakistan with Branick. (413). Nevertheless, when she was questioned later, Tira repeated the same story about the man named "Abdu". (410).

Tira repeated the "Abdu" story in a statement given in the office of an Assistant United States Attorney prior to presentment before the Magistrate and claimed that she was in Pakistan to study the Montessori method of teaching. (415). Although she claimed to be a school teacher in Tucson, Arizona, Miss Tira was not able to give the name of her supervisor. (416).

B. The Defense Case

1. Bradley Branick

Bradley Branick testified in his behalf. In summary, his defense was that he was not a hashish oil smuggler, but rather a handicrafts dealer who traded in Pakistani rugs. Branick produced a few invoices to prove the point. (532, 534). He gave as his reason for travelling one-half way around the world from Arizona to Pakistan the fact that he owed a Pakistani merchant money for rugs purchased for his then defunct store and because the mails to Pakistan were not entirely reliable. (558-560). Although his store had closed down earlier because business had been poor (537, 565, 618), he nevertheless agreed to pay passage for Barbara Tira, then his girlfriend, who was interested in studying the Montessori method of teaching, as well as for Jeffrey Pierce, who just asked Branick if he could come along. (548). Although he paid for Pierce's trip, Branick denied seeing him for more than two hours during all the time he was in Pakistan. (549). He denied, of course, knowing anything about Barbara Tira's suitcase containing hashish oil. (550).

Branick admitted that he met Pierce in 1972 and that he saw him in Afghanistan but he denied knowing anything about hashish oil. (542). He likewise admitted going to Pakistan in July 1973 with Pierce and Tira (544) and paying for Pierce's ticket (585), but his purpose in going to Pakistan was simply to speak to rug dealers (568), although he admitted that he did not in fact open his store until September 1973, two months after the trip. (603).

On cross-examination, Branick admitted going on six trips to various parts of the world during the period

between November 1972 and April 1976 in addition to those which he took with Tira and Pierce. Some of the trips were short while others lasted months at a time. For example, Branick was abroad from March through June 1973 looking for carpets even though his store had not opened. (590-593). The trips were paid for by different people, once by a Pakistani rug merchant (592), and on another occasion by a girlfriend of Branick's. (605). Branick managed to make two round-the-world trips in this period of time even though his business was not doing well. (614).

2. Barbara Tira

Barbara Tira did not testify and her principal defense consisted of attempting to impeach the credibility of the chief government witness, Pierce.

C. The Impeachment of Pierce and the District Court's Rulings on Access to His Pre-Trial Services File and the Pre-Trial Services Officer, Michalah Bracken

During the course of the trial, appellant Tira subpoenaed Michalah Bracken, a Pre-Trial Services officer. Ms. Bracken had written a memorandum on April 21, 1976, to Magistrate Vincent Catoggio, informing him that a Pre-Trial Services Officer in California had reported that the government witness, Pierce, had failed to report as ordered to the Pre-Trial Services Agency in California. (Court Exhibit 3, reproduced in Appellant Tira's Appendix). In order to impeach the credibility of Jeff Pierce and to show that he had allegedly received favors from the Government, appellant Tira sought access to the Pre-Trial Services file on Pierce. (286). In addition, Tira sought to call Michalah

Bracken as a witness and to introduce in evidence Ms. Bracken's memorandum to Magistrate Cattogio of April 21, 1976. (292, 294, 316). (Court Exhibit 3, reproduced in appellant Tira's Appendix). Judge Neaher denied all three requests. (291, 296, 317).

Judge Neaher entertained lengthy arguments on all points. After reviewing the Pre-Trial Services file on Pierce, the court determined that there was nothing in it which could assist appellant Tira in the cross-examination of Pierce. (288, 290). The Court ruled, moreover, that the Pre-Trial Services file on Pierce was protected by the rule of confidentiality established in Title 18 United States Code, Section 3154 and thus could not be used for anything other than a bail determination (289). Judge Neaher cited as further reason for his ruling Regulation 2:12 of the "Statement of General Policy as to Functions and Procedures of the Pre-Trial Services Agency for the United States District Court, Eastern District of New York" (Court Exhibit 2, reproduced in Appellant Tira's Appendix), which provides that:

> Information revealed in the course of the Pre-Trial able to or admissible in evidence on behalf of a third party or a co-defendant for any purposes including the exoneration of a co-defendant. (289).

Judge Neaher referred as well to Regulation 2:11 which provides that:

> Information revealed in the course of the Pretrial Service proceeding should not be available for the purpose of impeaching a defendant's credibility in the course of any proceedings pertaining to pending charges nor in any subsequent proceedings arising out of this charge." (289).

Second, Judge Neaher ruled that Ms. Bracken could not be called as a witness on the basis of her memorandum to Magistrate Catoggio. He noted that Bracken was not

a witness to Pierce's conduct, and her memorandum was "sheer hearsay" since it reported a conversation that she had had with a California Pre-Trial Services Officer regarding Pierce's conduct. (293-296). Third, he ruled on the same hearsay ground that the memorandum could not be received in evidence because it could only prove that the Magistrate was notified about Pierce's conduct and nothing else. (317).

ARGUMENT

POINT I

The District Court properly admitted evidence of prior hashish smuggling trips to Pakistan and Afghanistan taken by appellants Tira and Branick in 1972 and 1973.

Appellant Tira contends that it was reversible error for Judge Neaher to allow before the jury evidence relating to prior hashish oil smuggling trips in 1972 and 1973 by her, Pierce and Branick. Specifically, she objects to the testimony of Pierce and Schueneman relating to the offer made to them by Branick in November 1972 to fly to Afghanistan to smuggle hashish oil; the subsequent trip in December 1972 by Pierce to Afghanistan where he met Branick and received hashish oil; and the July 1973 trip to Pakistan by Branick, Pierce and Tira during which Pierce stated that he and Tira were given suitcases containing hashish oil and were paid by Branick to smuggle the oil to Arizona. The contention is without merit.

We note at the outset that the principal issue at trial with respect to appellant Tira was whether she knew that the suitcase she presented to customs on April 8, 1976, contained hashish oil. Accordingly, we submit that Judge Neaher properly allowed evidence of both Branick's and

Tira's prior involvement with hashish oil smuggling under Rule 404(b) of the Federal Rules of Evidence, in order to show knowledge, intent, planning and preparation in April 1976.[6] *United States* v. *Papadakis*, 510 F.2d 287, 294-295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

On the issue of Tira's knowledge, the jury could, of course, have rightfully considered her blatantly false exculpatory statement as circumstantial evidence of guilt. Statement of Facts, *supra*, p. 7, *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir.), *cert. denied*, 419 U.S. 1105 (1975). It was also proper for the jurors to take into account the fact that she journeyed half-way around the world with Branick. *United States* v. *Lim Lek Chong*, — F.2d — Slip op. 5725, 5735 (2d Cir. September 27, 1976). Similarly, the jury was entitled as well to consider evidence showing that virtually an identical smuggling scheme had been employed by appellants in the past, *United States* v. *Brettholz*, 485 F.2d 483, 488 (2d Cir.), *cert. denied*, 415 U.S. 976 (1974), and that each participant knew in April 1976 about the plan and intended to participate in it. *United States* v. *Cirillo*, 499 F.2d 873, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940).[7]

In addition, the challenged evidence was also admissible to show the background, origins, purposes and

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[6] Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[7] Appellant's reliance on *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975), is misplaced, because this Court there dealt with a case of "mere presence at the scene of a crime." Barbara Tira's presentation of a suitcase filled with $80,000 worth of hashish oil can hardly be characterized as "mere presence."

breadth of the conspiracy alleged in the indictment. *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir. 1974); *United States* v. *Natale*, 526 F.2d 1160, 1173-1174 (2d Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 1724 (1976); *United States* v. *Magnano*, 543 F.2d 431, 435 (2d Cir. 1976). "Evidence of the [smuggling trips] prior to the [April 1976 trip] tended to show the existence of a broad [hashish oil smuggling] conspiracy, of which the conspiracy charged in the instant indictment was a part. As such it was admissible". *United States* v. *Araujo*, 539 F.2d 287, 289 (1976).

To be rejected, also, is appellant Tira's contention, with respect to the similar act claim, that her 1973 trip to Pakistan to smuggle hashish oil was merely an isolated event from which no legitimate inference of her involvement in smuggling could be inferred. Cf. *United States* v. *Sperling*, 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971). The argument is frivolous. The evidence of prior involvement in smuggling activity was relevant to the issue of whether the April 1976 trip was, in fact, an isolated event.

Finally, although Judge Neaher admitted the similar act testimony in evidence, on more than one occasion during the trial he cautioned the jury that evidence relating to trips in 1975 and 1973 was being received for the limited purpose of showing the appellants' knowledge, motive, intent, and plans in 1976 and not to show that they were guilty of the crimes charged. (174, 360, 776). *United States* v. *Papadakis*, *supra*, at 510; *United States* v. *Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971).[8]

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[8] Similarly, Tira's argument that two conspiracies were shown, and that she was thereby prejudiced must also fail. We fail to see how it can be alleged that two separate conspiracies were

[Footnote continued on following page]

POINT II

The District Court properly refused to allow appellant Tira to inspect the Pre-Trial Services file relating to Pierce, the accomplice witness, and to call as a witness, Pre-Trial Services Officer Michalah Bracken.

Appellant Tira claims infringement of her Sixth Amendment right to confront the accomplice witness Pierce, because the court refused to allow inspection of the Pre-Trial Services file on Pierce and because it quashed the subpoena directed to the Pre-Trial Services agency.[9] (291, 296, 317).

The theory of appellant Tira's claim apparently is that by examining the Pre-Trial Services file on Pierce

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proved in this case. The indictment charged a conspiracy in April of 1976 to smuggle hashish oil into the United States. That single conspiracy is exactly what was proved, through the testimony of Pierce and through evidence of the hashish oil seizures from Pierce and Tira. Evidence of the 1973 conspiracy was introduced merely as a similar act. Moreover, the proper inquiry is not whether two conspiracies were proved but whether substantial prejudice resulted. *United States* v. *Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976). Even assuming *arguendo* that two conspiracies were shown with respect to Tira (the 1973 and the 1976 smuggling), it was clearly etablished that Tira was part of both conspiracies. Moreover, at no time did Tira move for severance, *United States* v. *Payden*, 536 F.2d 541, 543 (2d Cir. 1976), and there was no spill-over or transference effect which resulted because of a large number of defendants and conspiracies, *United States* v. *Bertolotti*, 529 F.2d 149, 156-157 (2d Cir. 1975); *United States* v. *Lam Lek Chong*, *supra*, 5738.

[9] The Pre-Trial Services file on Pierce was sealed by the District Court and marked as Court Exhibit 1 (291). The subpoena directed to the Pre-Trial Services agency was never made part of the record.

she might have been able to cross-examine him more thoroughly and presumably refute his assertion that he had not violated the conditions of his pretrial release, thereby discrediting his credibility. Furthermore, so the argument runs, access to the file would have enabled appellant to show that the Government had extended additional, unacknowledged consideration to the accomplice by not alerting the court to Pierce's alleged violations of the conditions imposed for pre-trial release. Appellant's theory appears to be identical with respect to the attempt to call Pre-Trial Services Officer Michalah Bracken.

Appellant's claim is without merit, and her reliance on *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969), and *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), is wholly misplaced. Both *Miller* and *Sperling* deal with the standards for ordering a new trial where the Government fails to disclose to the defense at or before trial § 3500 [10] or *Brady* [11] material.

The Pre-Trial Services file on Pierce, the accomplice witness, is not and could not be either § 3500 or *Brady* material. The file itself was not in the possession of the Government but rather in that of the District Court. Indeed, as Judge Neaher ruled at trial repeatedly (289, 291), the statute creating the Pre-Trial Services agency and the regulations established in the Eastern District of New York governing the use of Pre-Trial Service reports clearly restrict the use of such reports to bail determination and unmistakably prohibit the use at trial of such reports for the purpose of impeaching a co-defendant.

Title 18, United States Code, Section 3154, defines the functions and powers of the Pre-Trial Services agen-

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[10] *Jencks* v. *United States*, 353 U.S. 657 (1957) and Title 18 U.S.C. § 3500 *et seq.*

[11] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

cies and in relevant part it provides that the information obtained "shall be used only for the purpose of a bail determination and shall be otherwise confidential." [12] The statute also provides that in their respective districts, the Division of Probation or the Board of Trustees "shall issue regulations establishing policy on the release of agency files." In the Eastern District of New York, Regulation 2:12 of the "Statement of General Policy As to Functions and Procedures of the Pre-Trial Services agency for the United States District Court, Eastern District of New York," provides that:

> Information as defined above shall *not* be available to or admissible in evidence on behalf of a third-party or a co-defendant for any purpose, including the exoneration of a co-defendant. (Emphasis in original).

Regulation 2:11 provides that

> The information, as defined above shall *not* be available for the purpose of impeaching a defendant's credibility in the course of any proceedings pertaining to pending charges, nor in any subsequent proceedings arising out of other charges. (Emphasis in original).

We submit that on the basis of these regulations Judge Neaher properly rejected appellant Tira's argument at trial for access to the Pre-Trial Services agency's report. As we have already noted, *supra*, p. 10, Judge Neaher found that there was nothing in Pierce's file that would assist in the cross-examination of Pierce. (288, 290). We note further that appellant's claim that

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[12] The complete regulations were received as Court Exhibit 2 and are reproduced in appellant Tira's appendix.

she was not afforded the right to full and unimpeded cross-examination of Pierce must be weighed in light of the fact that her attorney had access to and was encouraged by the Court (319) to use, as a basis for cross-examination, the memorandum submitted by Ms. Bracken to Magistrate Cattogio, to show that Pierce had violated the conditions of his pre-trial release and to suggest that the Government, by not calling the violations to the court's attention, was extending favors to him in return for his testimony.[13]

In fact, counsel for Tira established that Pierce did not live at home with his parents every night (338); that he did not report to Pre-Trial until Mr. Gonzalez, a Probation Officer, called him (337); and that he was not brought in before the court for violation of his bond (342-343). Counsel reminded the jury in summation, moreover, of Pierce's alleged violations (729, 730) and suggested that the Government's alleged reluctance or failure to call Pierce's violations to the Court's attention somehow established further motive for him to incriminate appellant Tira (727).[14]

We submit, moreover, that Judge Neaher properly quashed the subpoena directed to the Pre-Trial Services Officer. Regulation 2:3 of the "Statement of General Policy" (Appellant's Appendix, Court Exhibit 2), provides that Pre-Trial Services officers are not subject to subjoena or any other form of judicial process except in certain limited circumstances. This case clearly presented no such circumstances, which include the furnishing of information for providing custody and care for

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[13] The memorandum Court Exhibit 3, is reproduced in appellant Tira's appendix.

[14] Compare, *United States* v. *Padgent*, 432 F.2d 701, 704 (2d Cir. 1970), where this Court reversed a conviction on the ground that the district judge did not allow cross-examination of an accomplice regarding allegations of bail jumping.

persons released pursuant to Title 18, U.S.C., Section 3154, and information which is needed in connection with offenses committed by an individual in the course of obtaining pre-trial release. See Regulations 2:6 and 2:9 of the "Statement of General Policy" (Appellants Appendix, Court Exhibit 2).

Furthermore, we submit that even if the Pre-Trial Services Officer could have been subpoenaed to testify, Judge Neaher properly quashed the subpoena on the ground that whatever testimony would have been elicited would have been extrinsic evidence of specific instances of misconduct, not permitted under Rule 608(b) of the Federal Rules of Evidence. (510).[15] On the same ground and because it was inadmissible hearsay, Judge Neaher did not allow into evidence Ms. Bracken's memorandum to the Magistrate. See *supra*, p. 11.

We submit finally that the thorough cross-examination of counsel for appellant of the accomplice Pierce was sufficient to afford the jury a basis to evaluate the defense theory, *United States* v. *Benny Ong*, 541 F.2d 331, 342 (2d Cir. 1976), and that the restrictions of appellant Tira's cross-examination were well within the district court's discretion. *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, 423 U.S. 1074 (1976).

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[15] Rule 608(b) provides that "[s]pecific instances of the conduct of a witness for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. . .

CONCLUSION

The judgments of conviction should be affirmed.

Dated: January 21, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
ELIA WEINBACH,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

ELIA WEINBACH, being duly sworn, says that on the 24th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~xx~~ TWO COPIES OF THE BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Helena Pichel Solleder, Esq.
19 Rector Street
New York, New York
10006

John C. Corbett, Esq.
66 Court Street
Brooklyn, New York 11201

Sworn to before me this
24th day of January, 1977

Carolyn N. Johnson

NOTARY PUBLIC, State of New York
No. 41-[illegible]
Qualified in [illegible]
Term Expires March 30, 19[illegible]27

Elia Weinbach
ELIA WEINBACH